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The Special Called Work Session of the Mayor and Council of the City of Milton was held on September 21, 2009 at 5:00 PM, Mayor Joe Lockwood presiding.

Council Members Present: Councilmember Karen Thurman, Councilmember Julie Zahner Bailey, Councilmember Bill Lusk, Councilmember Burt Hewitt, Councilmember Tina D'Aversa, Councilmember Alan Tart

Mayor Lockwood

- There is one item on the agenda postponed from the September 14, 2009 Work Session.
- Public comment is allowed that is germane to an agenda item.
- If you wish to speak you are required to fill out a public comment card and turn it into the City Clerk staff.
- Public comment will be allowed for a total of 10 minutes per agenda item and no more than 2 minutes per person.
- Public comment will be heard at the beginning of each item.
- Once the item is called no more public cards will be accepted.

City Clerk Marchiafava read the agenda item.

Discussion on the criteria that must be followed when considering variances.

City Attorney Jarrard

- The Zoning Ordinance was modified this year and the City Council has the ability to consider concurrent variances as part of zoning relief.
- He can share some things that work and do not work in the realm of variances.
- He will go through the Zoning code very quickly then hit some of the case law about some broad concepts.
- This is fairly typical variance criteria.
- Section 22.3.1 says a variance must be based upon credible evidence, to make the Council aware that does mean there is a burden upon the variance applicant.
- They have a responsibility to provide to you facts, evidence.
- There needs to be a showing.
- The credibility and the merits of the proof are up to Council.
- You are acting in a quasi judicial capacity which means you hear the facts and then apply them to the law and the law is what was adopted earlier this year.
- The code is very clear that when you hear one of these concurrent variances, you apply the same standards that the BZA does when it hears a primary variance.
- What are the criteria to vary from the rules you have set in place?
- Number one, if you grant the variance, would that relief not offend the spirit or intent of the ordinance.
- It then says and which is different than or, it means that is simply one of four criteria that must be satisfied.
- Number two, you have found in your own discretion that there are such extraordinary and exceptional situations and conditions pertaining to this particular piece of property that the literal or strict implication of the ordinance would create an unnecessary hardship due to the size shape of topography.
- This does something a little clever in this code, or other extraordinary and exceptional situations or conditions not caused by the variance applicant.
- Within B there are basically two bases for relief.
- The first is based upon the size and shape and topography of the property.

- A lot of variances in other jurisdictions that is the only criteria you can get a variance.
- Thus, if you have an unusually configured piece of property and maybe it has double frontages on roads such that there are a lot of setbacks, you may conclude because of the significant burden that puts on the property owner that a variance to strict interpretation of the setback or the strict interpretation of the buffer or some other requirement needs to be varied or waived or mitigated or lessened to avoid causing an undue burden on that property owner.
- That is one of your variance criteria.
- Look at the or in the fourth line down.
- It says or other exceptional and extraordinary conditions not caused by the variance applicant.
- You will notice that the not caused by the variance applicant does not apply to the size shape and topography language, it is not in there.
- It is only in that second sub part which is curious because under the standard rules of contract or construction or statutory construction, if a thing is included in one area and not included in another area, there is an assumption that was purposeful.
- That means that since it was not added in the context of size shape and topography that if the applicant caused the problem with the size shape and topography that does not add nor does it automatic bar to giving the variance but in the second one, or other exceptional or extraordinary situations or conditions not caused by the variance applicant, if your applicant created the condition that necessitates the need for a variance and they caused it, that works as a bar to your review of their variance application.

Councilmember D'Aversa

- Asked if he could give a general example of something that someone would have created themselves.

City Attorney Jarrard

- What he is used to in variances is that individuals are coming in and asking for forgiveness rather than permission in the variance context.
- First of all lets think about a variance that you would need that is not related to size shape and topography of property.
- He has seen the inevitable basketball court or the cabana or the pool and you have to ask yourself if that is a variance.
- They want that variance because the pool goes too far into the setback or it goes too near the buffer and you have to ask yourself if that is a condition on the property due to the size shape or topography of the property that necessitates the granting of the variance so as not to cause undue burden on the property owner or is it a piece of property that just will not fit a pool.
- Typically in legislation you do not see language like extraordinary and exceptional used lightly.
- That is powerful terminology.
- Having said that these are to be driven on a fact by fact base.
- Another example might be the variance to allow a trailer to be moved on my property so my aged and infirmed parents can live on the property, when in fact that is not allowed because of some requirement in the code.
- Does that necessitate a variance?
- It could be and you could be impressed with their presentation that it is an extraordinary and exceptional situation.
- He has seen a lot of situations where variances were granted where he personally did not believe they met the conditions of the code.

Councilmember D'Aversa

- So we have to be a quasi judicial body that makes those judgments, asked what happens if they make the judgment in one case and not in another and they are proven to be similar.

City Attorney Jarrard

- He thinks it is very difficult to have a common fact pattern in variances and he thinks it is difficult because the nature of a variance is it is supposed to be unusual.
- Sometimes people will come and ask for variance of multiple lots in the same subdivision.
- That in of itself is problematic because it is supposed to be a case by case examination of a particular piece of property.
- To keep going through the criteria, relief if granted would not cause a substantial detriment to the public good and surrounding properties which you all have plenty of experience with.
- Then D that the public safety, health and welfare are secured and that substantial justice is done.
- Anything where you act as a corporate body in the government, the underlying base upon which you act is to preserve the public safety, health and welfare.
- On 22.3.1 A, spirit or intent of your code, the very reason that you have a variance mechanism in your code anticipates that you understand there are going to be situations where the literal interpretation of the code may need to be waived or modified.
- Within that thought process you have also concluded, we do not want to modify our code in such a way that the spirit and intent of the ordinance is damaged and that is where you get into some of the case law that says, you do not approve a variance where it manifest and objectionable product as to how your vision is for the community.
- That is important because people may come to you with request that do in fact offend the spirit of the code.
- Going down to the second criteria with respect to size shape and topography, there have been situations where because of the regulatory overlays that the lot is rendered unbuildable.
- If that is the situation, would that be an appropriate place for a variance, he thinks it would be.
- You do not want to have an administrative taking.
- You do not want someone in court saying, because of the regulations imposed by the City of Milton, my land is worth zero.
- Not many pieces of property can make that claim but if they do it is a good reason for a variance.

Councilmember Thurman

- She has always felt there was a difference and that the developer should have known if it was unbuildable at the time they platted it and one that became unbuildable later on because of a change in zoning laws or a change in setbacks or easements etcetera.

City Attorney Jarrard

- It is a point that could be argued aggressively by the local government that the builder was on notice that this lot was not going to be viable and in pursuit of due diligence they should have made themselves aware.
- That would be fact driven.
- His concern would be that if the local government accepts a plat and records the plat and somebody stamps off on the plat, from the land owners perspective they could argue.

Councilmember Zahner Bailey

- Along those same lines that premise of buildable lots often they will hear from an applicant that they want to have a particular level of density of use and the argument would be they had purchased the land with the intent of having a more dense use on the property.
- Asked if they could talk about the distinction between some buildable and what is the maximum that is allowable.
- Not every property or lot is necessarily allowable for all levels of density and often that becomes the issue.

City Attorney Jarrard

- The example he was using was a lot or a development that has zero economic liability.
- The court does not believe that the local government has the requirement or obligation to maximize profits for those individuals and that is not your job either.

Councilmember Tart

- It seems the way this is written someone could buy a piece of land that they know is not buildable and qualify for the variance provision.

City Attorney Jarrard

- You may find that does not represent an extraordinary and exceptional situation.

Councilmember Zahner Bailey

- We have a lot of slopes and topographical issues and streams and waterways and by the very nature of where we are as a community a lot of times land is not going to yield the same density that it might in an area that has sewer or has less water ways etcetera.
- It is her belief that the lay of land is not necessarily the need for a variance.

City Attorney Jarrard

- The code was written with an eye toward the community that it was designed for so you have to ask yourself, does the Milton Council that adopted the code understand the topography of the jurisdiction that you are in and you probably do and you have expert planners that tell you these things and will help you.
- Courts will give you wide and broad deference in how you interpret this code and in how you wrote it.
- A lot of effort went into getting these exact words just right.

Councilmember D'Aversa

- Asked him to talk about how they might abuse their discretion with variances.

City Attorney Jarrard

- Variances are supposed to be the exception and not the rule.
- Your discretion with respect to those variances will be upheld short of an abuse of your discretion.
- The court will look at you and say, I am going to give you a very wide berth in making the decisions that you make unless the decision that you make shows from a reasonable exercise of your discretion that the court simply cannot tolerate or sanction and a perfect example to him would be a lot of record, platted, the individual had been paying taxes that clearly suggested that it was being appraised by the local appraisers of the buildable lot, they had been paying those values for years, the jurisdiction then imposes new buffers that now swallow the entirety of the property.
- They come into the office to pull a permit and the people say you cannot build on it at all, it is totally subsumed by a buffer.
- They come to you and make an affective argument with credible evidence that a variance should be granted and because of no reason other than political pressure and you say without any compelling rationale, you say no.
- That is a situation where he thinks a court upon reviewing that would find the Council had abused its discretion.

Councilmember D'Aversa

- Asked how many parcels have to be included before it is a rezoning in a subdivision scenario.

City Attorney Jarrard

- That is something that he would know when he sees it and it would something he would have to work with them on.
- You have to be careful as to how many variances you want to give in a subdivision before you have really violated the spirit and intent of the Z
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- zoning code.
- He would like to go on the items for considerations regarding variances.
- He would like to talk about 6, 7, and 8 which are things he sees routinely when people are requesting variances.
- He has seen a variance applicant come forward with letters from their adjoining property owners and they say my adjoining property owners does not have any objection to granting these variances.
- That is great and certainly something you can take into consideration from the standpoint of their neighbor does not mind but just be mindful that that should neither work to grant a variance or deny a variance.
- You do not want to be in a situation where simply because someone is fine with their neighbor doing that that it therefore meets the variance criteria.
- He thinks they have the lawful duty to go through the criteria and make determinations for your own whether they have been satisfied.
- If there is something that presents no hardship, is not an exceptional or extraordinary condition of the property but the neighbor does not mind next door does not necessarily mean a variance should be granted.
- Conversely if the neighbor does not want it and comes and protest and ask you not to variance but you find there is an extraordinary and exceptional circumstance on the property, he does not think it is lawful to give a neighbor and adjoining property owner a pocket veto over a procedure you have put in place.
- Number 8, he has seen jurisdictions where no one will come and speak in opposition to the variance at the public hearing so the local board grants the variance.
- He would suggest there that just because the local community does not take the time to come and speak does not mean that should be an automatic grant of variance.

Councilmember Tart

- Say that we have been asked to award a variance and we do not find a hardship demonstrated in the evidence but this body grants the variance anyway, asked if that would be grounds for an adjacent land owner to take action against the city and has there been case law about that happening.

City Attorney Jarrard

- Certainly there would be a mechanism for someone who has standing to pursue a challenge to the variance.
- For instance if you grant a setback variance that allows the property owner to build a building two feet away from his neighbor's property, then he would have the right to come an challenge that and make the case that you had abused your discretion.
- When you grant an approval it would be helpful to have some findings in your motion so you can show why you took that action that you took.

Councilmember Tart

- Say there is a company that has been operating on a piece of land for 15 years and they are cited for operating illegally and they come and apply for a special use permit in order for them to keep doing what they have been doing for the last 15 years, asked if that would be considered a hardship.

City Attorney Jarrard

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- If they have to now get a special use permit and all these variance, asked if he could assume that before they did that they were operating illegally.

Councilmember Tart

- Yes.

City Attorney Jarrard

- Then he would not conclude that there is necessarily a hardship and he would apply what he would consider some traditional vesting analysis.
- What you look at with vesting is, in other words, I get to do something that is nonconforming because I have been doing for years previously and I want to keep doing it in the future irrespective of the rules that have changed, and the courts says, yeah but to vest what you were doing previously has to have been in all respects lawfully.

Mayor Lockwood

- Asked if there was anything else.

Councilmember Zahner Bailey

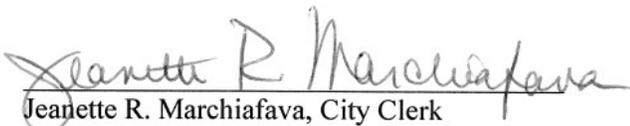
- Asked under 22.3.1 both C & D where it talked about the relief would not cause substantial detriment to the public good and surrounding properties, she is of the belief that substantial detriment also applies to things like water quality, asked if it was fair to say that when something that would be of negative impact to a waterway that impacts other people downstream, is that right.

City Attorney Jarrard

- It absolutely does.

After no further discussion the meeting ended at 5:52 p.m.

Date Approved: October 5, 2009


Jeanette R. Marchiafava, City Clerk


Joe Lockwood, Mayor